Leong Sing (sued as a firm) v Perusahaan Kuari (Melaka Pindah) Sdn Bhd (formerly known as Malacca Lian Hwa Sdn Bhd)

HIGH COURT (MELAKA) — CIVIL APPEAL NO 11–4 OF 1996
SURIYADI J
2 OCTOBER 1996

Partnership *— Action against firm in firm's name — Partnership terminated — Cause of action accrued before termination of partnership — Whether action commenced against correct party — Subordinate Courts Rules 1980 O 10 r 1*

Partnership *— Service of documents — Service on retired partner — Plaintiff knowing that partnership had dissolved — Cause of action accrued before dissolution of partnership — Partnership not served — Whether service proper — Subordinate Courts Rules 1980 O 10 r 3(2).*

Civil Procedure *— Pleadings — Statement of claim — Date of accrual of cause of action not stated — Defendant unable to submit proper defence — Whether pleadings in statement of claim defective*

This was an appeal from the decision of the magistrates' court in allowing the application of the respondent/plaintiff that the statement of defence of the appellant/defendant be struck out. The appellant, Leong Sing, was a partnership between two persons, namely, Teh Peng Lam ('TPL') and Teh Chwee Swi ('TCS'). During the subsistence of the partnership, a cause of action accrued on 7 August 1987 when the partnership defaulted in its payment for items which were bought from and delivered by the respondent. On 1 November 1989, the partnership turned into a sole proprietorship when TPL withdrew from the arrangement, leaving TCS on his own. On 9 January 1991, TCS passed away. On 20 June 1992, the respondent filed a writ against Leong Sing, based on the original name of the partnership and the same was served on TPL, followed by the filing of the defence on 18 August 1992. On 25 May 1993, the respondent under O 14 r 21(1) of the Subordinate Courts Rules 1980 ('the SCR') applied for the defence to be struck out. The respondent successfully obtained an order that the defence be struck out with a consequential order of a summary judgment. The appellant appealed on the grounds, inter alia, that: (i) the action was bad in law as not only had the partnership ceased to exist when the action was commenced but the litigation against the appellant/defendant was per its original name and was thus not in order; (ii) the partnership was not even served with the summons; (iii) TPL was instead served with the summons although he was not named as a defendant in the action; (iv) the estate of TCS was not included as a party; and (v) the date when the cause of action accrued was not provided in the statement of claim.

Held, allowing the appeal with cost:

(1) Order 10 r 1 of the SCR permits an action to be taken against the partnership founded on the time 'when the cause of action accrued'. Therefore whether the partnership was in existence or otherwise when the suit was lodged on 20 June 1992 was of no consequence. The cause of action here was alleged to have accrued on 7 August 1987 which was years before the termination of the partnership or the issuance of the writ by the respondents (see p 663I); *Western National Bank of City of New York v Perez Triana & Co* [1891] 1 QB 304, *Re Wenham* [1900] 2 QB 698 and *Noble Lowndes & Partners (a firm) v Hadfields Ltd* [1939] 1 Ch 569 followed.

(2) Even though the names of the individuals of the partnership were not mentioned, such an action was possible as it did tantamount to a suit being taken up individually against all those who were partners at the time of the accrual of the cause of action. Therefore to merely inscribe the partnership as the defendant without more was in order (see p 664I); *MK Varma & Anor v KM Oli Mohamed* [1950] MLJ 80 followed.

(3) It was proper for the respondent to litigate the case against the appellant using the partnership's name without any inclusion of the individual partners' names. Its cessation was not a stumbling block, so long as the accrual date of the cause of action was prior to its termination (see p 665G).

(4) Under O 10 r 3(2) of the SCR, where a partnership had dissolved to the knowledge of the plaintiff, a choice was given to the plaintiff to choose the person whom he wished to be made liable. As the respondents were aware of the dissolution before the commencement of the case, the respondents were within their right to select TPL to be made liable (see p 666D–E).

(5) To succeed in forwarding a satisfactory pleading the respondents had to ensure that all the ingredients and the requirements of O 10 r 1 of the SCR had been fully complied with. Having perused the contents, the statement of claim certainly fell short of the requirements of O 10 r 1 due to the absence of a major ingredient, namely the date when the cause of action accrued. Aside from the respondents being unable to identify the relevant date in the statement of claim, that defect would also prejudice the appellant as they would be unable to submit a proper defence. As the respondents' pleadings was blemished, the lower court should not have struck out the appellant's statement of defence (see p 668E–F).

[Bahasa Malaysia summary

Ini merupakan suatu rayuan daripada keputusan mahkamah majistret yang membenarkan permohonan penentang/plaintif bahawa pernyataan pembelaan perayu/defendan dibatalkan. Perayu, Leong Sing, adalah satu perkongsian antara dua orang, iaitu Teh Peng Lam

('TPL') dan Teh Chwee Swi ('TCS'). Semasa kewujudan perkongsian tersebut, kausa tindakan terakru pada 7 Ogos 1987 apabila perkongsian tersebut ingkar dalam bayaran untuk barangan yang dibeli daripada dan dihantar-serah oleh penentang. Pada 1 November 1989, perkongsian telah bertukar menjadi ketuanpunyaan tunggal apabila TPL menarik diri dari susunan ini, meninggalkan TCS keseorangan. Pada 9 Januari 1991, TCS telah meninggal dunia. Pada 20 Jun 1992, penentang memfailkan suatu writ terhadap Leong Sing, berdasarkan nama asal perkongsian tersebut dan ini telah disampaikan kepada TPL, disusuli dengan pemfailan pembelaan pada 18 Ogos 1992. Pada 25 Mei 1993, penentang di bawah A 14 k 21(1) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR') meminta supaya pembelaan dibatalkan. Penentang berjaya mendapatkan perintah bahawa pembelaan dibatalkan dengan perintah berbangkit penghakiman terus. Perayu membuat rayuan atas alasan, antara lain, bahawa: (i) tindakan adalah tidak elok di sisi undang-undang kerana bukan sahaja perkongsian tidak lagi wujud apabila tindakan dimulakan tetapi litigasi terhadap perayu/defendan adalah mengikut nama asal dan justeru itu tidak teratur; (ii) perkongsian tidak pun disampaikan dengan saman; (iii) sebaliknya TPL disampaikan dengan saman walaupun dia tidak dinamakan sebagai defendan dalam tindakan; (iv) harta pusaka TCS tidak dimasukkan sebagai suatu pihak; dan (v) tarikh apabila kausa tindakan terakru tidak diperuntukkan dalam pernyataan tuntutan.

Diputuskan, membenarkan rayuan dengan kos:

(1) Aturan 10 k 1 KMR membenarkan sesuatu tindakan diambil terhadap perkongsian berasaskan masa 'apabila kausa tindakan terakru'. Maka sama ada perkongsian wujud atau tidak apabila guaman dikemukakan pada 20 Jun 1992 adalah tidak penting. Kausa tindakan di sini dikatakan terakru pada 7 Ogos 1987 lama sebelum pemberhentian perkongsian atau pengeluaran writ oleh penentang-penentang (lihat ms 663I); *Western National Bank of City of New York v Perez Triana & Co* [1891] 1 QB 304, *Re Wenham* [1900] 2 QB 698 dan *Noble Lowndes & Partners (a firm) v Hadfields Ltd* [1939] 1 Ch 569 diikut.

(2) Walaupun nama-nama individu perkongsian tidak disebut, tindakan sedemikian adalah mungkin kerana ia sama seperti guaman terhadap semua yang adalah rakan kongsi pada masa kausa tindakan terakru. Maka hanya menyifatkan perkongsian sebagai defendan dan tidak lebih dari itu adalah mengikut aturan (lihat ms 664I); *MK Varma & Anor v KM Oli Mohamed* [1950] MLJ 80 diikut.

(3) Adalah wajar untuk penentang melitigasikan kes terhadap perayu dengan menggunakan nama perkongsian tanapa memasukkan sebarang nama individu rakan kongsi. Pemberhentiannya tidak merupakan suatu penghalang, selagi tarikh kausa tindakan terakru adalah sebelum penamatannya (lihat ms 665G).

(4) Di bawah A 10 k 3(2) KMR, di mana suatu perkongsian telah dibubarkan dengan pengetahuan plaintif, pilihan diberikan kepada plaintif untuk memilih orang yang dia ingin jadikan bertanggungjawab. Oleh kerana penentang-penentang sedar akan pembubaran sebelum kes bermula, penentang-penentang berhak memilih TPL sebagai pihak yang bertanggungjawab (lihat ms 666D–E).

(5) Untuk berjaya dalam mengemukakan pliding yang memuaskan penentang-penentang mestilah memastikan bahawa semua unsur dan keperluan A 10 k 1 KMR telah dipatuhi dengan sepenuhnya. Selepas membaca kandungan, pernyataan tuntutan jelas tidak memenuhi keperluan A 10 k 1 akibat ketiadaan suatu unsur yang utama, iaitu tarikh apabila kausa tindakan terakru. Selain daripada kegagalan penetang-penentang untuk mengenalpasti tarikh yang relevan dalam pernyataan tuntutan, kecacatan itu juga akan memudaratkan perayu kerana mereka tidak dapat menyerah pembelaan yang betul. Oleh kerana pliding penentang-penentang adalah tercemar, mahkamah rendah tidak patut membatalkan pernyataan pembelaan perayu (lihat ms 668E–F).]

Notes

For cases on service of documents on a partnership, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 905–909.

For cases on pleadings, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2506–2772.

Cases referred to

Drummond-Jackson v British Medical Association & Ors [1970] 1 All ER 1094 (refd)

Malayan Banking Bhd v Chua Keng Leng t/a New Fortune Enterprise [1991] 3 CLJ 2522 (refd)

MK Varma & Anor v KM Oli Mohamed [1950] MLJ 80 (folld)

Noble Lowndes & Partners (a firm) v Hadfields Ltd [1939] 1 Ch 569 (folld)

Poh Brothers Sdn Bhd (dahulunya dikenali sebagai Poh Brothers Muar Sdn Bhd) v UB Usahabina Sdn Bhd (Civil Appeal No 12–23–1996, unreported) (refd)

Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185 (refd)

Sykt Nip Kui Cheong Timber Contractor v Safety Life & General Insurance Co Sdn Bhd [1975] 2 MLJ 115 (refd)

Tuan Hj Ahmed Abd Rahman v Arab Malaysian Finance Bhd [1996] 1 MLJ 30 (refd)

Warner v Sampson & Anor [1959] 1 All ER 120 (refd)

Wenham, Re [1900] 2 QB 698 (folld)

Western National Bank of City of New York v Perez Triana & Co [1891] 1 QB 304 (folld)

Wigram v Cox Sons Buckley & Co [1894] 1 QB 792 (refd)

Legislation referred to

Rules of the High Court 1980 O 56 r 1, O 77 r 1
Rules of the Supreme Court 1883 [UK] O XLVIII, O XLVIIIA
Subordinate Courts Rules 1980 O 10 rr 1, 3(1), 3(2), O 14 r 21(1), O 49 r 6(1)

Hilary D'Cruz (*Bashir & Co*) for the appellant.
KP Ng (*KP Ng & Amardas*) for the respondents.

Suriyadi J: The appellant-cum-defendant, Leong Sing was a partnership between two persons; namely, Teh Peng Lam and Teh Chwee Swi. During the subsistence of the partnership, business went along as usual but unfortunately a cause of action accrued on 7 August 1987 when the partnership defaulted in its payment for items which were bought and delivered from the respondents. Despite that default, no legal action was undertaken by the respondents to recover the sum owing which totalled RM16,350.39. On 1 November 1989, that partnership turned into a sole proprietorship when Teh Peng Lam withdrew from the arrangement, thus leaving Teh Chwee Swi on his own. On 9 January 1991, Teh Chwee Swi passed away. Subsequent to all those dates and significant events, the respondents (plaintiffs) served two letters of demand dated 21 May 1992 and 4 June 1992 for the above said sum but it remained unpaid. On 20 June 1992, the respondents filed a writ against Leong Sing based on the original name of the partnership, followed by the filing of the defence on 18 August 1992. All these facts were not disputed by both parties.

On 25 May 1993, the respondents under O 14 r 21(1) of the Subordinate Courts Rules 1980 ('the SCR') applied for the defence to be struck out. This rule reads:

> The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any summons or anything in any pleading or in the indorsement, on the ground that —
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> (a) it discloses no reasonable cause of action or defence, as the case may be; or
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> (b) it is scandalous, frivolous or vexatious; or
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> (c) it may prejudice, embarrass or delay the fair trial of the action; or
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> (d) it is otherwise an abuse of the process of the Court;
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> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

For the purposes of this appeal, the grounds were that of O 14 r 21(1)(a), (b) and (c) only. On 16 January 1996, the respondents successfully obtained an order that the defence be struck out with a consequential order of a summary judgment. On 20 January 1996, the appellant filed the notice of appeal stating dissatisfaction with the whole judgment meted out by the magistrates' court. On 23 September 1996, I allowed the appeal with costs. The appellant had argued before me that:

(i) the action was bad in law as not only had the partnership ceased to exist when the action was commenced but the litigation against the

appellant defendant was per its original name and was thus not in order;

(ii) the partnership was not even served with the summons;

(iii) Teh Peng Lam was instead served with the summons although he was not named as a defendant in the action;

(iv) the estate of Teh Chwee Swi was not included as a party;

(v) the date when the cause of action accrued was not provided in the statement of claim; and

(vi) the appellant's defence was not frivolous and vexatious thus deserving the court's consideration.

Before pursuing with the appeal, to ensure no procedural mistake would be committed along the way, I took the precaution of ascertaining the legal foundation of this appeal. The relevant provision applicable zeroed in on O 49 r 6(1) of the SCR which reads:

> Notwithstanding anything contained in this Order, an appeal shall lie to a Judge in Chambers from any decision made by the Court other than a decision made after trial.

As this was a decision which did not emanate from a trial, the position would be quite similar to that of appeals from decisions of the Registrar of the High Court which end up with the judge in chambers (O 56 r 1 of the Rules of the High Court 1980) ('the RHC'). Cases which go direct to the judge in chambers on appeal not only undergo a process of actual re-hearing but are to be treated differently from cases tried fully in the subordinate courts. This interpretation was clearly laid down by the Federal Court through Edgar Joseph Jr FCJ in *Tuan Hj Ahmed Abd Rahman v Arab Malaysian Finance Bhd* [1996] 1 MLJ 30 at pp 36–37 when he said:

> With respect, in appeals to a judge in chambers from the decision of a registrar of the High Court, the judge is not exercising appellate jurisdiction in the same sense as when he hears appeals from judgments, decisions or orders of the subordinate courts. Such appeals from decisions of the registrar are by way of an actual re-hearing and the judge treats the matter as though it comes before him for the first time. The judge is therefore not confined to the points taken before the registrar so that the rule about new points being not generally open to an appellant to take on appeal does not apply.

In my previous grounds of decision in *Poh Brothers Sdn Bhd (dahulunya dikenali sebagai Poh Brothers Muar Sdn Bhd) v UB Usahabina Sdn Bhd* (Civil Appeal No 12–23–1996, unreported), I had remarked:

> To detract slightly as to why Edgar Joseph Jr FCJ had differentiated the treatment to be accorded to those two types of sources I could only detect these reasons. His Lordship in his wisdom must have had in mind when uttering those remarks that an appeal from the subordinate courts would be heard by an appeal judge in open court whilst a decision from the Registrar of the High Court would be heard by a judge in chambers. Moreover, an appeal from the lower courts is commenced by filing a notice of appeal in Form 140 as provided by O 49 of the Subordinate Courts Rules 1980. The notice of appeal shall be filed within 14 days from the day on which the

A decision was pronounced. After filing that notice of appeal O 55 of the Rules of the High Court 1980 will come into play whereafter the appellant shall file in the High Court in duplicate a memorandum of appeal and subsequently serving on each respondent that copy of such memorandum together with the record of appeal. In other words the process will be laborious, with the appeal to be confined to the issues in the required B documents. With regard to an appeal from the Registrar all that is required is that a notice be submitted in Form 114, requiring attendance before the judge on a day specified in that notice (O 56 of the Rules of the High Court 1980). No memorandum of appeal or records of appeal are required that will confine any counsel's arguments. Looking at the differences in the steps and the requirements it is no surprise that his Lordship Edgar Joseph Jr FCJ C made those comments.

On the above grounds I must, aside from consistency's sake, conclude that for the purposes of this case I was entitled to go through the rigmarole of an actual hearing without being curtailed by the arguments canvassed at the lower court or by any statutory documents.

D For a better understanding of the sequence of the appeal's arguments and my stance over them, I shall justify that decision by a process of elimination supported by the relevant explanations.

The action was bad in law as not only had the partnership ceased to exist when E *the action was commenced but the litigation against the defendant was per its original name and thus not in order (argument No 1)*

It was not denied that on 20 June 1992 when the statement of claim was filed, the partnership had extinguished by reason not only of the withdrawal of Teh Peng Lam on 1 November 1989 (OPH2 p 9 RR), but also by the F death of Teh Chwee Swi on 1 September 1991. With that scenario prevailing, a relevant question that necessitated argument was whether action had been commenced against the correct party, hence enabling the action to be sustainable. It was also argued that the letter dated 1 July 1992 which was part of the court's document (consented by both parties to be one of the agreed documents) was addressed to a non-existent partnership.

G After some consideration — despite the attractive argument of the appellants — I was convinced that this format of instigating a legal suit was proper and in compliance with O 10 r 1 of the SCR. This rule reads:

> Subject to the provisions of any written law, any two or more persons claiming to be entitled, or alleged to be liable, as partners in respect of a H cause of action and carrying on business within the jurisdiction may sue, or be sued, in the name of the firm (if any) of which they were partners at the time when the cause of action accrued.

On this score, the argument of the respondents was on solid ground as this rule permitted an action to be taken against that partnership founded on the time 'when the cause of action accrued'. Therefore, whether the I partnership was in existence or otherwise when the suit was lodged on 20 June 1992 was of no consequence. The cause of action here was alleged to have accrued on 7 August 1987 which was years before the termination of the partnership or the issuance of the writ by the respondents.

Since the cause of action related to matters of partnership, the said O 10 r 1 of the SCR was considered by me, a provision which is in pari materia with O 77 r 1 of the RHC. Aside from these statutory provisions, assistance was also sought from case law beginning with *Western National Bank of City of New York v Perez Triana & Co* [1891] 1 QB 304 where at p 314, Lindley LJ said:

> When a firm's name is used, it is only a convenient method for denoting those persons who compose the firm at the time when that name is used, and a plaintiff who sues partners in the name of their firm in truth sues them individually, just as much as if he had set out all their names.

The second case significantly worthwhile to refer to is the case of *Re Wenham* [1900] 2 QB 698, which dealt with O XLVIII, a provision which was partly in pari materia with O 77 of the RHC. In that case, the decision was appealed against but eventually dismissed. With regard to the above O XLVIII, Rigby LJ had this to say (at p 707):

> I need only refer to O XLVIIIa, which does not appear to lay down anything new, but to recognize effectually what was well-known law before — that people cannot alter in substance their relations to their creditors on the ground that they have dissolved partnership.

A nearly similar interpretation was arrived at in *Noble Lowndes & Partners (a firm) v Hadfields Ltd* [1939] 1 Ch 569, where at p 572 Farwell J said:

> It is said in the present case that the original plaintiff is non-existent, and on the principle of Russell J's decision a living person cannot be substituted for a firm which never had any existence. In my judgment that case is not applicable here. Order XLVIIIA enables persons carrying on business in partnership to sue or be sued in the firm name, but that is a rule made for convenience, *and an action by or against a firm notwithstanding the rule remains an action by or against the individual members of the firm.* That appears from the rule itself, which enables the other side to ascertain at once the names and addresses of the individuals. *Such an action remains therefore an action by or against individuals* ... . (Emphasis added.)

(See the case of *Sykt Nip Kui Cheong Timber Contractor v Safety Life & General Insurance Co Sdn Bhd* [1975] 2 MLJ 115 which followed the above remarks).

Another case in point is *MK Varma & Anor v KM Oli Mohamed* [1950] MLJ 80, where Gordon-Smith J maintained (at p 81) that 'the plaintiffs had the alternatives of joining all the partners as plaintiffs or of taking advantage of the special procedure by suing in the firm name'. In the current case, even though the position was in the reverse where the intitulment regarding the partnership was questioned the above opinion would still be equally applicable vis-a-vis the defendants. To reiterate, even though the names of the individuals of the partnership were not mentioned, such an action was possible as it did tantamount to a suit being taken up individually against all those who were partners at the time of the accrual of the cause of action. Therefore to merely inscribe the partnership as the defendant without more was in order.

A The next issue I had to consider was whether it was proper for a suit to be instituted in 1992 when by then the partnership had ceased. On this point, I had no problems as O 10 r 1 of the SCR is very clear and unambiguous. This provision in ringing terms reads that the appellants 'may ... be sued, in the name of the firm (if any) of which they were B partners at the time *when the cause of action accrued*'. (Emphasis added.) At the beginning of the century on this point, Wright J — in a highly accurate and articulate manner when discussing O XLVIII which was partly in pari materia with O 77 of the RHC — commented in *Re Wenham* at pp 700–701:

> C In this case there was a cause of action against two brothers as members of the firm of 'Wenham Brothers'. After that cause of action had accrued the firm dissolved partnership. Then the creditors who had the cause of action brought their action against the firm, the writ being issued against 'Wenham Brothers'. If this question had arisen in the year 1881 we might have had to hold, having regard to the judgments of Lord Selborne LC and Cotton LJ in *Ex parte Young, Re Young* (1881) 19 Ch D 124, that the action could not D be brought against the firm in the firm name, so as to bind John Wenham by the judgment, because the partnership had been dissolved before the issue of the writ in that action. But since then O XLVIIIa has been framed for the purpose of meeting the difficulty, and the changes which are effected by the rules of that order point strongly to the conclusion that it was expressly intended to alter the provisions of the former rules which dealt E with the matter, *and to provide a convenient procedure by enabling co-partners to be sued in the name of the firm of which they were co-partners at the time of the accruing of the cause of action, leaving the question of fact, whether a person was a partner when the cause of action accrued, to be decided in the action.* (Emphasis added.)

F On this issue too *Mallal's Supreme Court Practice* (1983) at p 1082 had this to say:

> At the time of the accruing of the cause of action: These words enable the co-partners in a firm dissolved before action to sue or be sued as a firm provided the co-partnership existed at the time the cause of action accrued.

G In conclusion, under this heading it was proper for the respondents to litigate the case against the appellants using the partnership's name without any inclusion of the individual partners' names. Also, its cessation was not a stumbling block so long as the accrual date of the cause of action, was prior to its termination.

H *The appellants were not served with the summons — instead Teh Peng Lam, a previous member of the partnership was served with it though not named as a defendant in the action (argument Nos 2 and 3)*

At the outset, on a finding of fact, I must confirm that no proper service was carried out on the named defendant (appellant). Of course, it would I have been an impossible task to do so on the said partnership as even by 1 November 1989 it had already become a sole proprietorship with the remaining member declared dead on 9 January 1991. Instead, as confirmed by para 7 of the affidavit of one Ong Peng Hai a manager in the respondent's

company (p 4 RR), the summons was served on the ex-partner, ie the abovementioned Teh Peng Lam. Not unexpectedly, the appellant argued that this service was not in order. The appellant suggested that the proper thing to do was to bring the estate of the dead person and Teh Peng Lam in as co-defendants and everything would be as right as rain.

The relevant provision here as I see it is O 10 r 3(2) of the SCR which reads:

> Where a partnership has, to the knowledge of the plaintiff, been dissolved before an action against the firm is begun, the summons by which the action is begun must be served on every person within the jurisdiction sought to be made liable in the action.

Under O 10 r 3(1), on an understanding that the partnership was viable when the summons was issued, the method of service was by serving on any one or more of the partners or at the principal place of business of the partnership within the jurisdiction on any person having at the time of service the control or management of the business. For this situation even if any member were to be abroad, the service was deemed to be good. In the second situation as envisaged by the abovesaid O 10 r 3(2) where a partnership had dissolved to the knowledge of the plaintiff, a choice was given to the plaintiff to choose the person whom he wished to be made liable. In this case, the unfortunate Teh Peng Lam was the chosen one much to his chagrin.

In the case of *Wigram v Cox Sons Buckley & Co* [1894] 1 QB 792, Cave J discussed O XLVIIIA r 8(c) which reads:

> Where a judgment or order is against a firm, execution may issue —
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> (a) ...
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> (b) ...
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> (c) against any person who has been individually served, as a partner, with the writ of summons and has failed to appear. But except as against any property of the partnership, a judgment against a firm shall not render liable, release, or otherwise affect any member thereof who ... has not appeared to the writ unless he has been made a party to the action.

On this point at pp 795–796, His Lordship said:

> Where there has been a dissolution to the knowledge of the plaintiff, he cannot make an outgoing partner liable, unless he serves the writ of summons upon him. Here the plaintiff, although he knew when he commenced his action that the appellant was no longer a member of the firm, chose, as he had a right to do, to issue his writ against the firm in their firm name, and chose also not to serve the appellant who had gone out. Therefore, as there has been no service, either actual or constructive, upon the appellant, the plaintiff cannot proceed against him under r 8.

The ratio decidendi in that case was that the appeal was allowed as there had been no service on the appellant either actual or constructive and as such the plaintiff could not proceed to make him liable. In the previously mentioned case of *Re Wenham*, Wright J when discussing O XLVIIIA (r 8) (endorsed by the Court of Appeal) agreed that if a person had been served

with the writ of summons execution could be issued on him. For purposes of understanding *Re Wenham* better, suffice for me to say that an action was filed against the partnership without naming the individual partners, based on a cause of action which accrued prior to its dissolution (like the current case). John Wenham was served with a writ of summons and he failed to appear before the court. Wright J held him liable as not only was he served with the writ but he also came within the scope of the relevant Order.

To conclude on this point for purposes of this current case, as the respondents were aware of the dissolution before the commencement of the case, the respondents were within their rights to select Teh Peng Lam to be made liable. For purposes of this case too, as Teh Peng Lam had positively admitted receiving the summons his fate was sealed thus enabling the respondents to proceed with the matter.

The estate of Teh Chwee Swi was not included as a party (argument No 4)

On this point I seek the assistance of *Mallal's Supreme Court Practice* (1983) p 1080 which is very revealing. It reads:

> Deceased Partner: The death of a partner operates as a dissolution ... . When a partner dies ... before action is brought against the firm, judgment can only be obtained against the firm which will bind the surviving partners and enforced against them and the partnership assets. The dead man is not a party to the action, so far as his private estate is concerned, for a dead man cannot be sued, though the legal representative of a dead man can be sued in a proper case.

To complete this issue, reference was made to 1 *The Supreme Court Practice* (1995) Pt 1 1380 para 81/1/10, which reads:

> Where a partner dies before action, and the action is brought against the firm alone in the firm name, the deceased partner is not a party to the action at all so far as his private estate is concerned ... (*Re Shepherd* (1890) 43 Ch D 131). Where a person who was a partner at the date of accrual of the cause of action dies before action brought, it would seem that his executors need not be made parties to the action.

To conclude the respondents could have made the deceased's estate similarly liable but chose not to do so as it was unnecessary. On that basis I had to reject the appellant's arguments that there was a necessity in this case to rope in Teh Chwee Swi's estate and to make the deceased's estate equally liable.

The date when the cause of action accrued was not provided in the statement of claim and the appellant's defence was not frivolous and vexatious thus deserving the court's consideration (argument Nos 5 and 6)

Paragraph 6 of the statement of defence was a bare statement which, when translated into English, reads 'save and except as hereinbefore admitted each and every allegation in the statement of claim is denied as if the same were set out herein seriatim and specifically traversed'. This was a catch-

all defence which was exceedingly general in nature purposefully included to cover potential unrebutted allegations. It is trite law that mere denials or general denials are insufficient and must instead specifically plead facts which allegedly make a claim unmaintainable and also to prevent opponents from being taken by surprise (see *Malayan Banking Bhd v Chua Keng Leng t/a New Fortune Enterprise* [1991] 3 CLJ 2522; *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185). Therefore, what value was I to confer on this bare statement which on the face of it was ineffective? To answer this, I sought solace from the case of *Warner v Sampson & Anor* [1959] 1 All ER 120 where Lord Denning at p 123 discussed that general traverse. He concluded that the general denial 'does no more than put the plaintiff to prove' — which meant that the onus of proof had thus shifted to the other party making it incumbent upon the latter to reshift that burden. On that perimeter as the appellant had included the general traverse, that meant the onus of proof had thus shifted to the respondents to answer. Aside from this onerous duty of shifting the onus of proof, the respondents who were also the plaintiffs were simultaneously lumbered with the burden of proof, a duty which never shifts. For the purposes of this case, as the proverbial ball had rolled into the court of the respondents, the latter thus had to convince the court that the statement of claim was satisfactory. To succeed in forwarding a satisfactory pleading, the respondents had to ensure that all the ingredients and the requirements of O 10 r 1 of the SCR had been fully complied with. Having perused the contents, the statement of claim certainly fell short of the requirements of O 10 r 1 due to the absence of a major ingredient, namely the date when the cause of action accrued. Aside from the respondents being unable to identify the relevant date in the statement of claim, that defect would also prejudice the appellant as they would be unable to submit a proper defence. In a manner of speaking, the statement of claim within its own sub-structure had already germinated the seed of its own destruction, which could not be rectified unless amended. Unfortunately, the respondents had not done that. Since the respondents had not been able to shift the onus of proof there would thus be no necessity for the appellant to reply. It is trite law that the burden is always onerous on any applicant before succeeding in any striking out action. A mockery of the law would certainly ensue if the applicant were to be successful, when the very foundation of his case was ridden with weaknesses, deserving a dismissal instead.

As to whether I should seek out the assistance of other documents, viz the affidavits to cover the defects of the statement of claim as implored by the respondents, the case of *Drummond-Jackson v British Medical Association & Ors* [1970] 1 All ER 1094 is illuminating especially the summary under 'Held' which reads (at the same page):

> **Held** ... the summary power to strike out a pleading for failure to disclose a reasonable cause of action was one which should be exercised only in plain and obvious cases, where the alleged cause of action, on consideration only of the allegations in the pleading, was certain to fail ... .

A For purposes of clarification, I pursued further and in the process was impressed by the discussion of Lord Pearson at p 1101 over practices of courts compiled in *The Supreme Court Practice* (1970), in particular the notes under RSC O 18 r 19. When discussing the practice by which the courts have approached the question whether a statement of claim disclosed any reasonable cause of action, His Lordship at p 1102a summarized as follows:

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> Thirdly, an application for the statement of claim to be struck out under this rule is made at a very early stage of the action when there is only the statement of claim without any other pleadings and without any evidence at all.

C Bearing in mind O 14 r 21(2) did not permit the infusion of affidavits for my consideration before deciding whether there was a reasonable cause of action, I stopped there. I concluded that without the affidavits to beef up the respondents' case, the statement of claim was defective. Since that was the unenviable position of the respondents, that meant the latter would invariably fail to prove that the defence was plainly and obviously D unsustainable. As the first obstacle, viz its own pleadings, was blemished the magistrate thus should not have struck out the statement of defence. On the same argument as above, as I considered the chances of the respondents over the other sub-headings being successful as being highly remote, I thus allowed the appeal.

E *Appeal allowed.*

Reported by Eugene Lee Hong Whye

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